JUDGMENT OF THE COURT (First Chamber)

24 March 2011 *

In Case C-369/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 14 September 2009,

ISD Polska sp. z o.o., established in Warsaw (Poland),

Industrial Union of Donbass Corp., established in Donetsk (Ukraine), and

ISD Polska sp. z o.o. (formerly Majątek Hutniczy sp. z o.o.), established in Warsaw,

represented by C. Rapin and E. Van den Haute, avocats,

applicants,

* Language of the case: French.

the other party to the proceedings being:

European Commission, represented by E. Gippini Fournier and A. Stobiecka-Kuik, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, E. Levits, M. Safjan and M. Berger (Rapporteur), Judges,

Advocate General: Y. Bot,
Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By their appeal, ISD Polska sp. z o.o., Industrial Union of Donbass Corp. and ISD Polska sp. z o.o., formerly Majątek Hutniczy sp. z o.o., ask the Court to annul the judgment of the Court of First Instance of the European Communities (now the General Court) of 1 July 2009 in Joined Cases T-273/06 and T-297/06 *ISD Polska and Others* v *Commission* [2009] ECR II-2185, 'the judgment under appeal'), whereby the latter dismissed their annulment action against Commission Decision 2006/937/EC of 5 July 2005 on State aid C 20/04 (ex NN 25/04) in favour of the steel producer Huta Częstochowa SA (OJ 2006 L 366, p. 1; 'the contested decision').

Legal context

2 The Europe Agreement, signed in Brussels on 16 December 1991, establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part (OJ 1993 L 348, p. 2; 'the Europe Agreement'), entered into force on 1 February 1994. It lays down a system of competition based on the criteria of the EC Treaty.

3 Protocol No 2 of the Europe Agreement, concerning ECSC products ('Protocol No 2') provides that public subsidies are prohibited in principle.

4 Article 8 of Protocol No 2 states:

'1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and [the Republic of] Poland:

…

(iii) public aid in any form whatsoever except derogations allowed pursuant to the ECSC Treaty.

…

4. The Parties recognise that during the first five years after the entry into force of the Agreement, and by derogation [from] paragraph 1(iii), [the Republic of] Poland may exceptionally, as regards ECSC steel products, grant public aid for restructuring purposes provided that:

— the restructuring programme is linked to a global rationalisation and reduction of capacity in Poland,

— it leads to the viability of the benefiting firms under normal market conditions at the end of the restructuring period, and

— the amount and intensity of such aid are strictly limited to what is absolutely necessary in order to restore such viability and are progressively reduced.

The Association Council shall, taking into account the economic situation of [the Republic of] Poland, decide whether the period of five years could be extended.

…'

5 Decision No 3/2002 of the EU-Poland Association Council of 23 October 2002 extending the period set in Article 8(4) of Protocol No 2 (OJ 2003 L 186, p. 38) extended for a further period of eight years starting on 1 January 1997, or until the date of the Republic of Poland's accession to the European Union, the period within which the Republic of Poland could exceptionally, in respect of 'steel' products, grant public aid for restructuring purposes under the conditions listed in Article 8(4) of Protocol No 2.

6 Article 2 of the Decision of the Association Council provides:

'[The Republic of] Poland shall submit to the Commission … a restructuring programme and business plans that meet the requirements listed in Article 8(4) of Protocol [No] 2 and that have been assessed and agreed by its national State aid monitoring authority (the Office for Competition and Consumer Protection).'

7 Protocol No 8 on the restructuring of the Polish steel industry, annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 948; 'Protocol No 8'), authorised the Republic of Poland, in derogation from the general rules on State aid, to grant aid for the restructuring of its steel sector in accordance with the detailed rules laid down in the restructuring plan and the conditions stipulated in that protocol. It provides among other things:

'1. Notwithstanding Articles 87 [EC] and 88 [EC], State aid granted by [the Republic of] Poland for restructuring purposes to specified parts of the Polish steel industry shall be deemed to be compatible with the common market provided that:

— the period provided for in Article 8(4) of Protocol [No] 2... has been extended until the date of accession,

— the terms set out in the restructuring plan on the basis of which the abovementioned Protocol was extended are adhered to throughout the period 2002-06,

— the conditions set out in this Protocol are met, and

— no State aid for restructuring is to be paid to the Polish steel industry after the date of accession.

…

3. Only companies listed in Annex 1 (hereinafter referred to as "benefiting companies") shall be eligible for State aid in the framework of the Polish steel restructuring programme.

4. A benefiting company may not:

(a) in the case of a merger with a company not included in Annex 1, pass on the benefit of the aid granted to the benefiting company;

(b) take over the assets of any company not included in Annex 1 which is declared bankrupt in the period up to 31 December 2006.

…

6. The restructuring aid granted to the benefiting companies shall be determined by the justifications set out in the approved Polish steel restructuring plan and individual business plans as approved by the Council. But in any case the aid paid out in the period of 1997-2003 and in its total amount shall not exceed PLN 3 387 070 000.

…

No further State aid shall be granted by [the Republic of] Poland for restructuring purposes to the Polish steel industry.

…

10. Any subsequent changes in the overall restructuring plan and the individual plans must be agreed by the Commission and, where appropriate, by the Council.

…

18. Should the monitoring show that:

…

(c) [the Republic of] Poland in the course of the restructuring period has granted additional incompatible State aid to the steel industry and to the benefiting companies in particular,

the transitional arrangements contained in this Protocol shall not have effect.

The Commission shall take appropriate steps requiring any company concerned to reimburse any aid granted in breach of the conditions laid down in this Protocol.'

8 Council Decision 2003/588/EC of 21 July 2003 on the fulfilment of the conditions laid down in Article 3 of Decision No 3/2002 (OJ 2003 L 199, p. 17; 'Council Decision 2003/588') provides in its sole article:

'The restructuring programme and business plans submitted to the Commission by [the Republic of] Poland on 4 April 2003 pursuant to Article 2 of … Decision No 3/2002 … are in compliance with the requirements of Article 8(4) of … Protocol [No] 2.'

9 Article 6(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) states:

'The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.'

10 Article 7(5) of that regulation provides:

'Where the Commission finds that the notified aid is not compatible with the common market, it shall decide that the aid shall not be put into effect (hereinafter referred to as a "negative decision").'

11 Article 14 of Regulation No 659/1999 states:

‘1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a “recovery decision”). The Commission need not require recovery of the aid if this would be contrary to a general principle of Community law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

…’

12 According to Article 20(1) of that regulation:

‘Any interested party may submit comments pursuant to Article 6 following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission pursuant to Article 7.’

13 Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999 (OJ 2004 L 140, p. 1) provides:

'1. Unless otherwise provided for in a specific decision the interest rate to be used for recovering State aid granted in breach of Article 88(3) [EC] shall be an annual percentage rate fixed for each calendar year.

It shall be calculated on the basis of the average of the five-year inter-bank swap rates for September, October and November of the previous year, plus 75 basis points. In duly justified cases, the Commission may increase the rate by more than 75 basis points in respect of one or more Member States.

…

4. In the absence of reliable money market or yield on stock bonds or equivalent data or in exceptional circumstances the Commission may, in close co-operation with the Member State(s) concerned, fix a recovery rate on the basis of a different method and on the basis of the information available to it.'

14 With regard to the detailed rules for the application of the interest rate, Article 11(2) of Regulation No 794/2004 provides:

'The interest rate shall be applied on a compound basis until the date of the recovery of the aid. The interest accruing in the previous year shall be subject to interest in each subsequent year.'

Background to the dispute

15 Between 2002 and 2005, a restructuring operation took place in respect of the Polish steel producer Huta Częstochowa SA ('HCz'). To that end, HCz's assets were transferred to new companies.

16 Thus, in 2002, Huta Stali Częstochowa sp. z o.o. ('HSCz'), whose parent company was Towarzystwo Finansowe Silesia sp. z o.o. ('TFS'), a company wholly owned by the Polish Treasury, was established in order to carry on the steel production of HCz. HSCz leased HCz's production facilities from the receiver and took over the majority of the employees.

17 In 2004, the companies Majątek Hutniczy sp. z o.o. ('MH') and Majątek Hutniczy Plus sp. z o.o. ('MH Plus') were founded. Their shares were wholly owned by HCz. MH received HCz's steel assets and MH Plus received certain other assets necessary for production.

18 Assets not linked to production (called 'non-steel assets') and the electricity company Elsen were transferred to Operator ARP sp. z o.o., a company answerable to Agencja Rozwoju Przemysłu SA (the Polish Industrial Development Agency, owned by the Polish Treasury), in order to settle public-law claims subject to restructuring (taxes and social security contributions).

19 By letter of 19 May 2004, the Commission informed the Republic of Poland of its decision to open the formal investigation procedure concerning the restructuring aid granted to HCz (published in the *Official Journal of the European Union* on 12 August 2004 (OJ 2004 C 204, p. 6) and invited all the interested parties to submit their

comments concerning the facts and legal analysis contained therein. It received comments from the Republic of Poland and from four interested parties.

20 In a document of 3 February 2005 entitled 'Declaration concerning State aid which may have been granted to [HCz] and/or [HSCz]', ISD Polska sp. z o.o. (at that time trading under the business name ZPD Steel sp. z o.o.; 'ISD'), a wholly-owned subsidiary of Industrial Union of Donbass Corp. ('IUD'), made the following statement in the context of the negotiations which preceded its acquisition of HSCz, MH, MH Plus and 10 other subsidiaries of HCz:

'Should the Commission adopt a decision ordering [HCz], [HSCz] or a person who has taken over the assets of [HCz] to repay unlawful public aid falling within the scope of aid under the restructuring programme and not exceeding in total [PLN] 20 million, we declare that that decision shall in no way have the effect of exonerating us from the obligations arising from the offer and we undertake not to present or assert any claim for compensation directed against (a) the tax authorities of the Republic of Poland, (b) [Agencja Rozwoju Przemysłu SA], (c) [TFS], (d) [HCz] … and linked to the need to repay the aid or to any relevant procedure pursued before the Commission following the grant of the public aid to [HCz]. We undertake, in such a case, to ensure that [MH], [MH Plus] and [HSCz], or other companies, along with their successors in law (regardless of the form of ownership of that successor), shall repay the amount of the unlawful public aid fixed in the Commission decision, even if that decision were exclusively to relate to [HCz].'

21 At the end of the procedure, the Commission concluded that, contrary to its initial doubts, the measures for the restructuring of HCz in accordance with the provisions of the Law of 30 October 2002 on public aid for undertakings having special impact on the labour market (Dz. U. No 213, position 1800), as amended, did not constitute State aid within the meaning of Article 87(1) EC.

22 By contrast, the Commission found that HCz had benefited on several accounts from State aid over the period from 1997 to 2002, only part of which was compatible with the common market. The Commission ordered repayment of the part which it found incompatible with the common market, amounting to PLN 19 699 452 ('the aid in question').

23 On 5 July 2005, the Commission adopted the contested decision. Article 3 of that decision states:

'1. The State aid which [the Republic of] Poland awarded to [HCz] between 1997 and May 2002 as operating aid and aid for employment restructuring amounting to PLN 19 699 452 is incompatible with the common market.

2. [The Republic of] Poland shall take all necessary measures to recover from [HCz], the Regionalny Fundusz Gospodarczy, [MH] and [Operator ARP sp. z o.o.] the aid referred to in paragraph 1 and unlawfully made available to [HCz]. All these companies shall be jointly and severally liable.

Recovery shall be carried out without delay and in accordance with the procedures under national law, provided these allow the immediate and effective implementation of this Decision. The sums to be recovered shall bear interest from the date on which they were made available to [HCz] until their actual recovery. The interest shall be calculated in conformity with the provisions laid down in Chapter V of... Regulation … No 794/2004.

…'

24 In Article 4 of the contested decision, the Commission approved the proposed change in the Polish National Restructuring Plan under point 10 of Protocol No 8 in so far as it would permit the restructuring of HCz without State aid and without increasing production capacity.

25 Pursuant to two agreements concluded on 30 September 2005, which came into effect on 7 October 2005, ISD: (1) purchased from HCz all of their shares in MH and MH Plus, along with 10 remaining subsidiaries of HCz; and (2) purchased from TFS all of their shares in HSCz, thus becoming the owner of HSCz, MH, MH Plus and 10 other subsidiaries of HCz.

26 By letter of 17 February 2006, the Commission requested the Polish authorities to inform it of the interest rates applicable to recovery of the aid in question from the jointly and severally liable debtors referred to in Article 3(2) of the contested decision. In their reply of 13 March 2006, the Polish authorities made a proposal regarding the appropriate recovery interest rates to be applied and the principles for calculating the interest. In particular, they proposed taking as a basis for the period from 1997 to 1999 the rate for Polish zloty five-year fixed-rate Polish Treasury bonds and, for the period from 2000 until the accession of the Republic of Poland to the European Union, the 10-year rate for those same bonds. Furthermore, in the light of the situation of the capital markets in Poland at that time, which was characterised by very high, but rapidly falling, interest rates, they requested that those rates be updated annually and that the interest should not be calculated on a compound basis.

27 In its reply of 7 June 2006, the Commission stated that the interest rate applicable to recovery of the aid in question had to be, for the whole of the period in question, the rate for PLN five-year fixed-rate Polish Treasury bonds, and that, pursuant to Article 11(2) of Regulation No 794/2004, that interest rate had to be applied on a compound basis.

28 By letters dated 7 July and 16 August 2006 respectively, the Commission communicated the contested decision to IUD and MH. On 21 December 2006, that decision was published in the *Official Journal of the European Union*.

29 On 15 November 2006, the merger of ISD and MH took place, ISD having assumed all the rights and obligations of MH.

The action before the General Court and the judgment under appeal

30 By their action before the General Court, in Case T-273/86, the applicants ISD and IUD sought, inter alia, the annulment of Article 3 of the contested decision, raising six pleas in support.

31 The first plea claimed infringement of Protocol No 8, the fourth plea claimed infringement of the principle of the protection of legitimate expectations, and the sixth plea claimed infringement of Regulation No 794/2004. The second, third and fifth pleas have not been raised in support of the appeal, and will therefore not be examined hereafter.

32 In Case T-297/06, ISD sought identical forms of order and submitted four pleas identical in substance with those raised in Case T-273/06, but further pleaded that Article 4 of the contested decision should be annulled.

33 By their first plea, the applicants challenged, in essence, the applicability ratione temporis and ratione personae of the Community rules on State aid and the power of the Commission to review compliance with those rules during the period before the accession of the Republic of Poland to the European Union.

34 In that regard, the General Court confirmed that Articles 87 EC and 88 EC do not apply, in principle, to aid granted before the accession of a Member State which is no longer granted after accession, and that, therefore, the Commission is relying on Protocol No 8 as a lex specialis in order to justify its power.

35 Observing that that scheme differs in several respects from the general scheme laid down by the EC Treaty and by Annex IV to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 797; 'Annex IV to the Act of Accession'), the General Court noted, in paragraph 93 of the judgment under appeal, that Protocol No 8 refers to aid granted during the period from 1997 to 2003, authorises a limited amount of restructuring aid granted for that period to certain companies listed in Annex 1 thereto, but prohibits all other State aid for the restructuring of the steel industry.

36 Finding, in paragraph 94 of the judgment under appeal, that the retroactive application of Protocol No 8 is laid down in point 6 thereof, which covers the period from 1997 to 2003, the General Court finally rejected, in paragraphs 95 and 96 of the judgment under appeal, the applicants' argument that, since at the time of the publication of Protocol No 8 in September 2003, that period had almost expired, the only meaning of that reference to the period from 1997 to 2003 is that calculation of future aid is to be made by taking account retrospectively of the amounts of aid already granted. According to the Court, the purpose of Protocol No 8, on the contrary, was

'to establish a comprehensive system for the authorisation of aid intended for the restructuring of the Polish steel industry and not merely to avoid the aggregation of aid by benefiting companies'.

37 The Court therefore concluded, in paragraph 97 of the judgment under appeal, that, in relation to Annex IV to the Act of Accession and Articles 87 EC and 88 EC, Protocol No 8 is a lex specialis which extends the review of State aid carried out by the Commission pursuant to the Treaty to aid granted in favour of the reorganisation of the Polish steel industry during the period from 1997 to 2003.

38 As regards the argument concerning the applicability ratione personae of Protocol No 8, according to which the latter does not concern undertakings not listed in Annex I thereof, the Court held, in paragraph 99 of the judgment under appeal, that point 3 of that protocol expressly states that only the companies listed in that Annex 1 are to be eligible for State aid in the framework of the Polish steel restructuring programme. If a company not listed in Annex 1 were able to retain unlimited amounts of restructuring aid received before accession without reducing its production capacity in return, Protocol No 8 would be rendered meaningless.

39 With regard to the argument based on point 4(b) of Protocol No 8, to the effect that it is only benefiting companies which may not take over the assets of a company not listed in Annex 1 to Protocol No 8 which has been declared insolvent, the Court points out that the applicants' interpretation of that provision is incorrect. Even if one were to assume that that provision provided for the possibility for third parties to take over the assets of an insolvent company not included in Annex 1 to Protocol No 8, that would in no way imply that that third party was not obliged to pay back unlawful aid received by that company. Since the situation of HCz could not, therefore, be compared to that of an insolvent undertaking not listed in Annex 1 to Protocol No 8,

the claim alleging infringement of the equal treatment principle in the application of that protocol was also dismissed by the Court.

40 To uphold the plea alleging infringement of the principle of equal treatment would thus essentially be tantamount to calling into question Protocol No 8, which, as a source of primary law, forms part of the Treaty (see paragraphs 100 and 101 of the judgment under appeal).

41 As for the argument that the Commission exceeded its powers, the Court pointed out, in paragraph 102 of the judgment under appeal, that Protocol No 8 provides that the Commission is to take appropriate steps requiring reimbursement of any aid granted in breach of the conditions laid down in that protocol, including review measures pursuant to Article 88 EC, so that the Commission had the power to review compliance with the provisions of Protocol No 8.

42 The General Court thus dismissed all the arguments alleging infringement of Protocol No 8.

43 In their fourth plea, the applicants argued that, in its decision to open the formal investigation procedure concerning the restructuring aid granted to HCz, the Commission failed to indicate precisely the State aid the withdrawal of which it is demanding in the contested decision, which has also had the consequence of vitiating that latter decision with illegality arising from infringement of the principle of the protection of legitimate expectations. Their legitimate expectation lay in the fact that IUD expected that the disputed aid would be regarded as repaid and that the aid granted before 2003 had been duly drawn to the notice of the Commission.

44 The applicants argued in that respect that the Commission had given them grounds to expect that the aid received by HCz would not be cancelled. The applicants could legitimately believe that the Commission would not demand recovery of the aid received by HCz and argued that, even if the disputed aid was not notified within the meaning of Articles 87 EC and 88 EC, it had been 'duly announced' according to the relevant procedures of Protocol No 2.

45 In that regard, the General Court held, in paragraph 134 of the judgment under appeal, that such an expectation was not capable of being protected under the principle of the protection of legitimate expectations. The applicants were neither induced by a Community measure to take a decision which, subsequently, resulted in negative consequences for them, nor were they the beneficiaries of a favourable administrative measure of a Community institution which was revoked retroactively by that institution. Referring to Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, the Court pointed out, in paragraph 135 of the judgment under appeal, that undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 88 EC and that a diligent trader should normally be able to determine whether that procedure has been followed.

46 The Court further found, in paragraph 136 of the judgment under appeal, that, in the present case, no notification of the aid in question took place, given that it was granted at a time when the Republic of Poland was not yet a member of the European Union and that, therefore, notification pursuant to the procedure laid down in Article 88 EC was not possible.

47 The Court also dismissed, in paragraphs 137 and 138 of the judgment under appeal, the applicants' arguments that the aid in question was 'duly announced' in accordance with the relevant procedures of Protocol No 2. In so far as the applicants were referring to Council Decision 2003/588, in which the Council found that the restructuring programme and business plans submitted to the Commission by the Republic of Poland on 4 April 2003 complied with the requirements of Article 8(4) of Protocol

No 2, it had to be noted that the business plan relating to HCz was not submitted to the Commission and was not therefore covered by the approval contained in Decision 2003/588.

48 With regard to the Commission's explanatory memorandum concerning its proposal for the Council decision cited above, according to which the extension of the derogation laid down in Article 8(4) of Protocol No 2 would have the effect of retroactively legalising any aid that may have been granted illegally since the entry into force of the Europe Agreement, the Court observed, in paragraph 139 of the judgment under appeal, that those terms are not included in Council Decision 2003/588. A simple Commission proposal for a Council decision was not capable of giving rise to a legitimate expectation on the part of the applicants.

49 The Court also dismissed all the arguments based on infringement of the principle of the protection of legitimate expectations.

50 By their sixth plea, concerning in particular the determination of the interest rates applicable to the recovery of the aid in question, the applicants pleaded an infringement of Regulation No 794/2004, claiming that the Commission had not fixed an appropriate interest rate and that it had disregarded the objective of Articles 9 and 11 of the regulation, namely the re-establishment of the situation as it existed before the granting of the unlawful aid, by demanding interest on interest payments and by choosing a reference rate entirely out of touch with the reality of the Polish market between 1997 and 2004.

51 First, the applicants claim that, under Polish law, interest is payable only on the capital sums of tax arrears and tax legislation does not provide for the capitalisation of interest due on those arrears. They further submit that it was very rare between 1997 and 2004 for companies to obtain external long-term capital using bonds and bank loans expressed in Polish zlotys. In seeking to apply the interest rate for Polish

Treasury bonds, the Commission failed to use the rate correctly reflecting the advantage from which HCz benefited, thereby overvaluing that advantage. The repayment of the interest placed benefiting companies in a less favourable situation than the status quo ante.

52 With regard to the contested decision, the Court found, in paragraph 157 of the judgment under appeal, that interest was calculated in conformity with the provisions laid down in Chapter V of Regulation No 794/2004, and that, since the interest rate is fixed neither in the operative part nor in the grounds of the decision, the applicants' plea was redundant.

53 With regard to the method of calculating the interest, the Court held that the findings in the contested decision were purely declaratory in nature, since the method for calculating interest was contained in Regulation No 794/2004 itself. However, the applicants raised no plea of illegality against that regulation (see paragraph 159 of the judgment under appeal).

54 With regard to the letter of 7 June 2006, in which the Commission fixed the interest rate to be applied to recovery of the aid in question, the Court observed that Article 9(4) of Regulation No 794/2004 provides that the fixing of the applicable recovery interest rate must be carried out in 'close cooperation' with the Member State concerned.

55 In this case, the correspondence between the Commission and the Polish authorities showed that the fixing of the rate indeed took place in 'close cooperation' with the Republic of Poland, which proposed as the recovery interest rate the five- or ten-year Treasury bond rate, requesting that those rates be updated annually and that the

interest should not be calculated on a compound basis (paragraph 163 of the judgment under appeal).

56 The Commission, accepting those proposals in the main, took the view that only the five-year bond rate should be applied throughout the entire period from 1997 to 2004. It had a certain degree of discretion in that regard (paragraph 164 of the judgment under appeal).

57 With regard to the method of applying the interest, and in particular the calculation of the interest on a compound basis, the Court noted in paragraph 165 of the judgment under appeal that Article 11(2) of Regulation No 794/2004 states expressly that the interest rate is to be applied on a compound basis until the date of recovery of the aid and that the interest accruing in the previous year is to be subject to interest in each subsequent year. Furthermore, Article 13 of Regulation No 794/2004 provides that Articles 9 and 11 of that regulation are to apply in relation to any recovery decision notified after the date of its entry into force. As Regulation No 794/2004 was applicable at the time when the contested decision was adopted, the Commission was thus required to order that interest be calculated on a compound basis.

58 The General Court thus dismissed all the pleas alleging infringement of Regulation No 794/2004.

59 Having thus found all the applicants' pleas in support of their action unfounded, the Court dismissed the action in its entirety.

Claims of the parties before the Court of Justice

60 The appellants claim that the Court should:

— set aside the judgment under appeal;

— uphold in their entirety, or in the alternative in part, the claims submitted to the General Court in Joined Cases T-273/06 and T-297/06;

— order the Commission to pay the costs in their entirety;

— in the event of the Court deciding that there is no need to adjudicate, order the Commission to pay the costs pursuant to the combined provisions of Articles 69(6) and 72(a) of its Rules of Procedure.

61 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

The appeal

62 The appellants raise three pleas in support of their appeal, claiming infringement, respectively, of Protocol No 8, of the principle of the protection of legitimate expectations and Regulation No 659/1999, particularly Article 14(2) thereof, and of Regulation No 794/2004.

63 The Commission challenges, first, the admissibility of the appeal as a whole, and, secondly, specifically the admissibility of the first and third pleas and the foundation of all three pleas submitted by the appellants.

Admissibility of the appeal as a whole

Arguments of the parties

64 As a preliminary argument, the Commission claims that the appeal is inadmissible on the ground that, as regards the form of appeal, the appellants confuse an appeal on fact and law with an appeal on points of law, inasmuch as the appeal is essentially limited to reiterating arguments against the contested decision, as set out at first instance. The appellants do not state which passages of the reasoning of the General Court are challenged in particular or what errors of law the General Court is supposed to have committed in examining those arguments at first instance.

65 In that regard, the Commission argues that it follows from Article 225 EC, from the first paragraph of Article 58 of the Statute of the Court of Justice, and from Article 112(1)(c) of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. That requirement is not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, confines itself to reproducing the pleas in law and arguments previously submitted to the General Court. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake.

Findings of the Court

66 According to settled case-law, it follows from Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, in particular, Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 34; Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1, paragraph 68; and Case C-67/09 P *Nuova Agricast and Cofra* v *Commission* [2010] ECR I-9811, paragraph 48).

67 In that regard, the Court observes that, although admittedly certain portions of the line of argument put forward by the appellants in their pleas may lack rigour, that line of argument does, however, appear overall to be sufficiently clear for the purposes of identifying with the necessary precision the elements of the judgment under appeal

which are being challenged, and the legal arguments relied on in support of that challenge, and thus enables the Court to carry out its review of the lawfulness thereof.

68 Therefore, the Commission's objection of inadmissibility to the appeal as a whole must be dismissed.

The first plea

Arguments of the parties

69 By their first plea, the appellants argue that the General Court infringed Protocol No 8 by holding that, in point 6 thereof, the latter required that its provisions be applied retroactively. They argue that it is not apparent from the wording, the purpose or the general economy of that protocol that it had to be given retroactive effect.

70 In that regard, the appellants argue that, in reality, the purpose of Protocol No 8 was to enable the undertakings listed in Annex 1 thereto to benefit from State aid, within certain limits, between the time of its signature on 16 April 2003 and the end of 2003. The only element of 'retroactivity' identifiable in that protocol was the reference to the period 1997-2003, concerning either the total amount of the State aid which may be granted (point 6 of Protocol No 8) or the net reduction of capacity which the Republic of Poland must achieve (point 7 of the protocol). That meant that the calculation of future aid to be allocated to the beneficiary undertakings up to the end of 2003

was to be done not by retrospectively regarding the aid approved as being, in certain cases, unlawful, but by taking account retrospectively of the amounts of aid already allocated.

71 The appellants argue in that respect that, in accordance with the case-law of the Court of Justice (Case 98/78 *Racke* [1979] ECR 69; Case 99/78 *Weingut Decker* [1979] ECR 101; Case 84/81 *Staple Dairy Products* [1982] ECR 1763; Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869), as a general rule, the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication. It may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. That means that, save where indicated to the contrary, a Community law provision is deemed not to have retrospective effect.

72 In this case, the appellants argue, it is undisputed that, on 23 October 2002, the EU-Poland Association Council adopted a decision extending the period set in Protocol No 2 for a further period of eight years starting on 1 January 1997. That decision made the extension subject to two conditions. First, that the Republic of Poland submit to the Commission a restructuring programme and business plans, and secondly that they be finally assessed by the Commission (Articles 2 and 3 of the decision of the Association Council). Article 3 of that decision provided, in addition, that the implementation of the plans was to be regularly monitored by the Commission, for the Community, and by the Office for Competition and Consumer Protection, for the Polish part.

73 The Commission had concluded that the restructuring programme and the business plans submitted by the Republic of Poland satisfied the requirements of Article 8(4) of Protocol No 2 and the conditions laid down in Protocol No 8 and therefore, by its proposal, approved its final assessment and compliance with the undertaking of the Republic of Poland in Protocol No 8. Council Decision 2003/588 was finally adopted

to that effect. According to the appellants, the Commission thus went back in the contested decision on State aid granted between 1997 and 2002 under the exemption regime which had been extended by Council Decision 2003/588 subsequent to the signature of Protocol No 8 and referring thereto.

74 Moreover, point 6 of Protocol No 8 envisaged only future restructuring aid which could be paid to beneficiary undertakings and contained no express mention of a possible retrospective application. It was not clear from its content, purpose or general scheme that retroactive effect should be attributed to it.

75 Furthermore, the appellants argue that it is undisputed that the Polish authorities had envisaged including HCz in the list of beneficiary undertakings listed in Annex 1 to Protocol No 8 capable of benefiting from State aid under the restructuring programme of the Polish steel industry. They had abandoned that measure at the last minute, HCz having become insolvent and its viability being henceforth regarded as unlikely even with new aid. The viability of HCz at the time when the content of Protocol No 8 was determined thus constituted the only point distinguishing it from the eight beneficiary undertakings.

76 As from April 2003, the Polish authorities had envisaged restructuring HCz by a means other than insolvency. The Commission did not take account of that in its contested decision, even though those facts were known to it, and it thus treated two categories of persons whose legal and factual situations were essentially similar – the undertakings listed in Annex 1 to Protocol No 8 on the one hand, and the economic entity which had succeeded HCz on the other – in a radically different way. That

differentiated treatment of two situations which were essentially similar thus constituted an additional infringement of Protocol No 8.

77 In those circumstances, the Commission's interpretation of Protocol No 8 in the contested decision constituted a clear infringement of the protocol. The General Court, by not penalising that infringement, also infringed Community law.

78 The Commission begins by arguing that the first plea is partially inadmissible, for two reasons. First, the applicants pleaded in argument the Commission's proposal and Council Decision 2003/588 in the context of that plea, whereas that point had already been examined by the General Court under the plea alleging infringement of the principle of the protection of legitimate expectations. The appellants thus raise for the first time before the Court of Justice a plea and arguments which they did not raise before the General Court, so that that part of the plea should be declared inadmissible.

79 Secondly, as regards the argument that two essentially similar situations were treated differently, thereby infringing Protocol No 8, this argument was new in the sense that it was not pleaded by the applicant in Case T-297/06, in the context of the plea alleging infringement of Protocol No 8. Only the applicants in Case T-273/06 pleaded infringement of the equal treatment principle in the application of Protocol No 8. Therefore, this part of the first plea should also be declared inadmissible.

80 Regarding the substance, the Commission then states that it concurs with the reading by the General Court, according to which the aim of Protocol No 8 was to establish a comprehensive regime for the monitoring of State aids intended for the restructuring of the Polish steel industry. In its view, the very wording of point 6 of the protocol indicates a retroactive effect, in that the entirety of the period under consideration,

namely the years 1997 to 2003, was before the date of accession of the Republic of Poland to the European Union.

81 Moreover, the Commission challenges the appellants' argument that reference to that period signified in reality that the monitoring of aid before accession was limited to that granted between September and December 2003. The Commission thus takes the view that the reasoning of the General Court in paragraphs 93 to 97 correctly took into account the wording, purpose and general scheme of Protocol No 8, and that the Court was right to use it in support of its conclusion as to retroactive effect.

82 Finally, the Commission regards the appellants' arguments as being in any event unfounded, inasmuch as those arguments appear in reality to be challenging the exclusion of HCz from the list of beneficiary undertakings in Annex 1 to Protocol No 8 rather than any infringement of that protocol. Clearly, the action for annulment before the General Court was limited to review of the legality of the Commission's decision and did not permit a challenge to the legality of provisions of primary law such as those in Protocol No 8.

Findings of the Court

— Admissibility

83 As regards the Commission's objection of inadmissibility, on the basis of the novel character of the plea put forward, it is settled case-law that to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not

raised before the General Court would be to allow it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is confined to review of the findings of law on the pleas argued before the General Court (see, inter alia, Joined Cases C-186/02 P and C-188/02 P *Ramondín and Others* v *Commission* [2004] ECR I-10653, paragraph 60; Case C-68/05 P *Koninklijke Coöperatie Cosun* v *Commission* [2006] ECR I-10367, paragraph 96).

84 In this case, however, the Court finds that, contrary to what the Commission argues, the appellants are not raising a new plea before the Court but merely an argument which forms part of the plea alleging an infringement of Protocol No 8 already debated before the General Court. The appellants do refer to the documents cited by the Commission in order to establish infringement of Protocol No 8, but do not introduce any new claim from the legal point of view. Therefore, the Commission's objection of inadmissibility based on the novel character of the applicants' plea cannot be accepted.

85 As regards the Commission's objection of inadmissibility on the basis that the argument regarding a difference in the treatment of two essentially similar situations, invoked by the applicant in Case T-297/06, was new in the sense that it was not invoked by the latter at first instance but only by the applicants in Case T-273/06, it is sufficient to note that, since a party must be able to challenge all the grounds for a judgment adversely affecting it, where the General Court has joined two cases and given a single judgment which answers all the pleas submitted by the parties to the proceedings before the Court, each of those parties may criticise the reasoning concerning pleas which, before the General Court, were raised only by the applicant in the other joined case (judgment of 29 November 2007 in Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others* v *Commission*, paragraph 17; see also, by analogy, Case C-348/06 P *Commission* v *Girardot* [2008] ECR I-833, paragraph 50).

86 Therefore, the Commission's objection of inadmissibility based on the novel character of the appellants' plea cannot be accepted.

87 It follows from the foregoing that the first plea on appeal is admissible.

— Substance

88 As regards the foundation for this plea, it needs to be examined whether the General Court infringed Protocol No 8 by holding, in the judgment under appeal, that the Commission's power to monitor compliance with Community rules on State aid during the period prior to the accession of the Republic of Poland to the European Union is based on that Protocol and concerns aid granted during the whole of the period envisaged in point 6 of that protocol, namely from 1997 to 2003 and not, as the appellants argue, exclusively between the time of its publication on 23 September 2003 and 31 December 2003, since they call into question the retroactive effect of Protocol No 8.

89 It should be noted, in this respect, that the General Court reached that conclusion after examining, in paragraphs 89 to 97 of the judgment under appeal, the scope of Protocol No 8.

90 In the context of that analysis, the General Court first emphasised, in paragraph 90 of the judgment under appeal, that, with regard to the applicability *ratione temporis* of the Community rules on State aid, it is common ground that, in principle, Articles 87 EC and 88 EC do not apply to aid granted before accession which was no longer applicable thereafter.

91 The General Court then found, in paragraph 91 of the judgment under appeal, that the scheme established by Protocol No 8 differs in several respects from the general scheme laid down by the Treaty and by Annex IV to the Act of Accession. Thus, in accordance with point 1 of Protocol No 8, certain State aid granted by the Republic of Poland for restructuring purposes to specified sectors of the Polish steel industry, which would not normally be permissible under the terms of Articles 87 EC and 88 EC, is deemed to be compatible with the common market. Moreover, the Court points out that the transitional mechanism set out in Annex IV to the Act of Accession concerns only State aid granted before accession which is still applicable after the date of accession.

92 The General Court also points out, in paragraphs 93 and 94 of the judgment under appeal, that Protocol No 8 refers to aid granted during the period from 1997 to 2003 and thus during a period prior to the accession of the Republic of Poland to the European Union. The protocol authorises a limited amount of restructuring aid (PLN 3 387 070 000), granted for that period to certain undertakings listed in Annex 1 thereto, and provides that no other aid may be granted by the Republic of Poland for the restructuring of the Polish steel industry. It follows, according to the Court, that the retrospective application of Protocol No 8 is established by point 6 thereof, which refers to the period from 1997 to 2003.

93 Finally, the Court dismisses, in paragraph 95 of the judgment under appeal, the applicants' argument that given that, at the time of the publication of Protocol No 8 in September 2003, that period had almost expired, the only meaning of that reference to the period from 1997 to 2003 is that calculation of future aid was to be made by taking account retrospectively of the amounts of aid already granted, but not taking the view retroactively that the past aid was unlawful.

94 It emphasises, on the contrary, that the purpose of Protocol No 8 was to establish a comprehensive system for the authorisation of aid intended for the restructuring of the Polish steel industry and not merely to avoid the aggregation of aid by benefiting companies (see paragraph 96 of the judgment under appeal).

95 In the light of those findings, in paragraphs 97 and 104 of the judgment under appeal, the General Court dismissed the possibility of there being any infringement of Protocol No 8, deciding that the latter represented a *lex specialis* in relation to Annex IV to the Act of Accession and Articles 87 EC and 88 EC, which extended the review of State aid carried out by the Commission pursuant to the Treaty to aid granted in favour of the reorganisation of the Polish steel industry during the period from 1997 to 2003, and therefore dismissed the plea.

96 Contrary to what the appellants argue, the General Court did not infringe that protocol by coming to that conclusion.

97 The General Court rightly pointed out, in paragraphs 93 and 94 of the judgment under appeal, that Protocol No 8 itself provided in point 6 that it applied to the period covering the years 1997 to 2003, prior to the date of accession.

98 It is true that, according to settled case-law, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it follows clearly from their terms, objectives or general scheme that such effect must be given to them (see, inter alia, Case 21/81 *Bout* [1982] ECR 381, paragraph 13; Case C-34/92 *GruSa Fleisch* [1993] ECR I-4147,

paragraph 22; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 49; Case C-441/08 *Elektrownia Pątnów II* [2009] ECR I-10799, paragraph 33).

99 However, given that Protocol No 8 entered into force on 1 May 2004, contrary to the factual and legal backgrounds in the cases cited in support of the appellants' arguments, it is clear in this case from the wording of Protocol No 8 that it provides for retrospective effect by making express provision in respect of a period which had already largely elapsed at the time of its entry into force.

100 As regards the purpose and general scheme of Protocol No 8, contrary to what the appellants argue, this Court finds that, given that Articles 87 EC and 88 EC do not apply to aid granted before accession which is no longer applicable after it and in order to pursue the objective of prohibiting in principle any State aid save for derogations expressly provided for, such objective having already been defined in Protocol No 2, the establishment of a regime enabling the Commission to exercise monitoring of State aid by virtue of the Treaty over any aid granted for the restructuring of Polish steelmaking in the years 1997 to 2006 was the logical consequence of the continuity of subject-matter between the Europe Agreement and the Treaty as regards State aid, expressing, moreover, the objective of applying a single monitoring regime before and after the accession of the Polish Republic to the European Union.

101 The purpose of Protocol No 8 was therefore, as the General Court correctly stated, to establish a comprehensive system for the authorisation of aid intended for the restructuring of the Polish steel industry and not merely to avoid the aggregation of aid by benefiting companies.

102 Therefore, the General Court was right to dismiss the applicants' argument that Protocol No 8 should be interpreted as only covering the period between the date of its publication, in September 2003, and the end of 2003 and that, therefore, the calculation of future aid to be granted to the benefiting undertakings until the end of 2003 should be done not by retrospectively regarding past aid as unlawful, but by taking account retrospectively of amounts of aid already allocated.

103 It follows that, as the General Court rightly held, Protocol No 8 represents a *lex spécialis* which extended the power of the Commission to monitor aid granted in favour of the restructuring of the Polish steel industry during the period from 1997 to 2003.

104 As regards the appellants' argument that the Commission's proposal and Council Decision 2003/588 show that, in the opinion of those institutions, the undertakings given in Protocol No 8 had been complied with, suffice it to note that a secondary act of EU law cannot derogate from or modify an act of primary law, even if it was adopted subsequently.

105 Finally, as regards the appellants' argument concerning a difference in treatment, in so far as they argue that HCz should have been entered on the list of beneficiary undertakings in Annex 1 to Protocol No 8, suffice it to note that the appellants, by challenging in reality the exclusion of HCz from that list, call into question Protocol No 8 which forms an integral part of the Treaty and therefore has the status of primary law. On an appeal, the Court of Justice confines its role to review of the legality of the judgment given by the General Court and does not permit the legality of a provision of primary law to be called into question.

106 Having regard to all of the above considerations, the General Court was right to take the view that there was no infringement of Protocol No 8, and the first plea must be dismissed as unfounded.

The second plea

Arguments of the parties

107 By this plea, the appellants argue that the procedures laid down by Protocol No 2, by means of which the aid in question was brought to the notice of both the Commission and the Council, gave rise to a legitimate expectation on their part.

108 In that regard, the appellants argue that it is undisputed that the Commission learned that HCz had received State aid when it assessed the successive versions of the Polish restructuring programme. The Commission's proposal was published on 26 May 2003. Even allowing that the statement of reasons for that proposal was not capable of giving rise to legitimate expectation on the part of the appellants, the latter emphasise that the Commission was nevertheless informed of the aid in question.

109 Moreover, the appellants argue that, since Council Decision 2003/588 was adopted on the basis of the Commission's proposal and that decision found that the aid in question satisfied the conditions for exemption laid down in Article 8(4) of Protocol No 2, and in the absence of the formal procedures set out in Article 88 EC which did

not apply to the Republic of Poland at that time, the procedure followed by the Commission and the Council in this case fulfils the conditions laid down by the case-law on the protection of legitimate expectations.

110 The appellants cite in that respect Case T-123/89 *Chomel* v *Commission* [1990] ECR II-131 and Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, arguing that the protection of legitimate expectations extends to any individual who is in a situation in which it is shown that the Community administration has led him to entertain justified hopes.

111 They note that the right to claim the protection of legitimate expectations presupposes that three conditions are met, namely that precise assurances must have been given to the person concerned by the Community administration such as to give rise to a legitimate expectation on the part of the person to whom they are addressed and in accordance with the applicable rules.

112 The General Court has stated that such assurances, in whatever form they are given, are precise, unconditional and consistent information from authorised and reliable sources (Case T-203/97 *Forvass* v *Commission* [1999] ECR-SC I-A-129 and II-705, paragraphs 70 and 71; Case T-273/01 *Innova Privat-Akademie* v *Commission* [2003] ECR II-1093, paragraphs 26, 28, 29 and 32).

113 Applying that case-law to the Commission's proposal, the appellants conclude that point 6 of the statement of reasons for the proposal gave them precise assurances, that those assurances were of such a kind as to give rise to a legitimate expectation on their part, and were in accordance with the applicable rules. The three conditions required for the appellants to be able to rely on the legitimate expectation that the aid received was not unlawful or subject to subsequent repayment were therefore fulfilled. Moreover, the single article of Council Decision 2003/588 was of such a kind

as to give rise to the expectation on the part of the appellants that the restructuring programme was in accordance with the Europe Agreement and, therefore, that the aid contained in that programme was lawful.

114 The Commission, referring to the judgment in *Alcan Deutschland*, argues that its proposal, like Council Decision 2003/588, takes as its starting point the restructuring programme and business plans submitted by the Republic of Poland. The liquidation of HCz was envisaged therein, and there was no business plan therein for that company. Therefore, neither the Commission nor the Council could have provided precise assurances as regards specifically aid paid to HCz, since that undertaking was not envisaged.

115 Moreover, the Commission argues that the appellants do not challenge the findings of the General Court in paragraph 138 of the judgment under appeal that the business plan relating to HCz was not submitted to the Commission and could not therefore be covered by the approval contained in Council Decision 2003/588. The General Court based its reasoning on that finding. It was a finding of fact which the appellants do not deny, and which they cannot moreover challenge on appeal.

116 Therefore, the Commission argues, the plea alleging breach of the principle of protection of legitimate expectations must be rejected. Neither the operative part of the Commission's proposal, nor that of Council Decision 2003/588, nor the 13th recital in the statement of reasons for the Commission's proposal can provide the foundation for any legitimate expectation that business plans which were not submitted to the Commission, and which could not therefore be covered by those provisions, were in compliance with Protocol No 8.

117 Finally, the Commission points to paragraph 139 of the judgment under appeal, in which the General Court held that, since Council Decision 2003/588 did not include the considerations made by the Commission in its proposal, according to which the extension of the derogation laid down in Article 8(4) of Protocol No 2 would have the effect of retroactively legalising any aid that may have been granted illegally since the entry into force of the Europe Agreement, those terms were not included in the measure ultimately adopted by the Council. Thus, a mere proposal by the Commission is not capable of giving rise to a legitimate expectation on the part of the appellants.

118 The Commission further emphasises that the question appears in any event to be purely academic, since the appellants make no criticism of paragraph 139 of the judgment under appeal.

Findings of the Court

119 By their second plea, the appellants argue, in essence, that the General Court infringed the principle of the protection of legitimate expectations in so far as it did not find that the aid in question had been brought to the notice, in the context of the procedures under Protocol No 2, of both the Commission and the Council, thereby giving rise to a legitimate expectation on the part of the appellants. They further argue that the statement of reasons for the Commission's proposal for Council Decision 2003/588 and the single article of that proposal were of such a kind as to give rise, on the part of the appellants, to the legitimate expectation that the aid in question was regularised and the restructuring programme was lawful.

120 In that regard, it should be noted that the General Court came to its conclusion after retracing, in paragraphs 135 to 139 of the judgment under appeal, the origin of the various measures directly or indirectly concerning the aid in question. The Court then found that, first, the business plan concerning HCz was not submitted to the

Commission and is not therefore covered by Council Decision 2003/588 and, secondly, that that decision, unlike the statement of reasons for the Commission's proposal, does not provide that the extension of the derogation under Article 8(4) of Protocol No 2 had the effect of retrospectively regularising all the aid which had been unlawfully granted since the entry into force of the Europe Agreement.

121 In that regard, first of all, the appellants' argument that the Commission was informed of the existence of the aid in question is entirely irrelevant. Given that the business plan for HCz was not submitted to the Commission in the context of the procedures expressly laid down for that purpose, namely the programme for restructuring the Polish steel industry, a finding of the General Court which the appellants have, moreover, not challenged, and that the liquidation of HCz was expressly provided for therein, HCz could not be legally covered by Council Decision 2003/588.

122 Secondly, it should be noted that, according to settled case-law, the principle of the protection of legitimate expectations is among the fundamental principles of the European Union (see, in particular, Case 112/80 *Dürbeck* [1981] ECR 1095, paragraph 48).

123 It is also apparent from the case-law that the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where the Community authority has, by giving him precise assurances, caused him to entertain expectations which are justified (Case 111/86 *Delauche* v *Commission* [1987] ECR 5345, paragraph 24; Case C-82/98 P *Kögler* v *Court of Justice* [2000] ECR I-3855, paragraph 33; Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 147). The assurances given must, in addition, be in accordance with the applicable rules (see, to that effect, Case 228/84 *Pauvert*

v *Court of Auditors* [1985] ECR 1969, paragraphs 14 and 15; Case 162/84 *Vlachou* v *Court of Auditors* [1986] ECR 481, paragraph 6).

124 In this case, it is sufficient to note that, as regards the condition concerning precise assurances, contrary to what the appellants argue, a proposal for a decision from the Commission submitted to the Council cannot provide the foundation for any legitimate expectation that the aid in question will comply with the legal rules of the European Union.

125 Since it did not include the terms of the statement of reasons for the Commission's proposal, Council Decision 2003/588 cannot give rise to a legitimate expectation as to the lawfulness of aid in favour of a company the business plan of which was not submitted to the Commission and which could not therefore be covered by that decision. Thus, the abandoning of those terms should have revealed to the appellants the change of position of the European Union legislature as regards such regularisation of aid.

126 It follows that, in this case, the condition of precise assurances, required for a finding of infringement of the principle of the protection of legitimate expectations, was not met. Therefore, there is no need to examine whether the other conditions are present, since the conditions are cumulative.

127 Therefore, the General Court did not commit an error of law in holding that the contested decision did not undermine the legitimate expectations of the appellants.

128 In the light of all of the foregoing, the second plea must be dismissed.

The third plea

Arguments of the parties

129 By this plea, the appellants challenge the approval by the General Court of the interest rate applicable at the time of recovery.

130 The appellants argue that the General Court contented itself with a finding that the Commission had followed the procedure established in Article 9(4) of Regulation No 794/2004. In their submission, the Court should have examined whether the Commission had fixed an 'appropriate' rate within the meaning of Article 14(2) of Regulation No 659/1999, since assessment of whether the rate is appropriate does not end with the finding that the latter was fixed in cooperation with the Member State concerned.

131 The appellants consider that 'appropriateness' is a substantive concept, independent of the procedure which the Commission must follow in exceptional cases where it fixes the interest rate in close cooperation with a Member State. That autonomous concept – closely linked in the appellants' submission to the fact that the Commission has a discretion and that, in the final analysis, it is the Commission which lays down the determinant rate – needed to be interpreted, which the General Court did not do.

132 The appellants argue that, when interpreting that concept, account must be taken of the judgment in Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, which provides that recovery is intended to reestablish the situation such as it existed before the granting of the unlawful aid. In order to ensure equal treatment, they argue, it is

necessary to measure objectively the advantage resulting from the aid as from the time when it was placed at the disposal of the beneficiary undertaking.

133 The Commission being required to reestablish the situation which existed before the unlawful granting of aid, recovery of interest can, the appellants submit, be made only for the purpose of compensating for the financial advantages actually arising from the aid having been placed at the disposal of the beneficiary, and must be proportionate to the latter.

134 By disregarding the principle of the reestablishment of the previous situation and by choosing a reference rate completely at odds with the reality of the Polish market between 1997 and 2004, the Commission and the General Court, which held that the scope of Article 14(2) of Regulation No 659/1999 was subsumed on that point in that of Article 9(4) of Regulation No 794/2004, thus infringed those two Community provisions.

135 According to the Commission, that plea is irrelevant. The appellants are asking the Court on appeal to examine a plea which was not submitted to the General Court. The third plea, based primarily on an alleged infringement of Article 14(2) of Regulation No 659/1999, was not submitted to the General Court given that the only plea raised at first instance as regards the interest rate was that based on an infringement of Regulation No 794/2004. Consequently, the appellants could not complain that the judgment under appeal interpreted the concept of an 'appropriate' interest rate incorrectly, when the pleas for annulment raised did not call upon the General Court to interpret that concept.

136 In the alternative, the Commission argues that the appellants start from an erroneous premiss by claiming that the General Court held that the scope of Article 14(2) of Regulation No 659/1999 was subsumed in that of Article 9(4) of Regulation No 794/2004; that is to say that the Court held that the interest rate established by the Commission

was 'appropriate' for the sole reason that it had been fixed 'in close cooperation with the Member State'.

137 However, contrary to the appellants' claims, the General Court did not confine itself to finding that the Commission had followed the procedure in force, in close cooperation with the Member State, but expressed a view on the merit of the rate adopted, referring to the Commission's discretion and examining the reasons why the latter had dismissed certain proposals. Moreover, the Court concluded that a 'manifest error of assessment' had not been established and that calculation of interest on a compound basis was required by Regulation No 794/2004 (paragraphs 159 to 167 of the judgment under appeal).

138 Since the appeal does not submit any argument capable of calling the reasoning of the General Court into question, and does not contain any valid objection to that reasoning, the Commission takes the view that the General Court correctly examined the applicants' arguments, while remaining within the bounds of the annulment plea as raised at first instance which did not submit to the General Court the question of the 'appropriateness' of the interest rate with regard to Article 14(2) of Regulation No 659/1999.

Findings of the Court

— Admissibility

139 Regarding the Commission's objection of inadmissibility based on the fact that the third plea, based primarily on an alleged infringement of Article 14(2) of Regulation

No 659/1999, was not invoked in the proceedings before the General Court, the case-law cited in paragraph 83 of this judgment does indeed show that a plea submitted for the first time on an appeal before the Court of Justice must, in principle, be dismissed as inadmissible.

140 Thus, it must be noted that the appellants are asking the Court to examine the legality of the interest rate fixed by the Commission by reference to its appropriateness with regard to Article 14(2) of Regulation No 659/1999. However, that plea was not submitted to the General Court, the only plea raised before that Court concerning the interest rate being that claiming infringement of Regulation No 794/2004. Therefore, the Commission's objection of inadmissibility based on the novelty of the plea put forward by the appellants must be upheld.

141 It follows that the third plea, in so far as it is based on an alleged infringement of Article 14(2) of Regulation No 659/1999, must be held inadmissible. However, the third plea, as regards Regulation No 794/2004, is admissible.

— Substance

142 As regards the substance of this plea, suffice it to state that, given that the third plea, in so far as it is based on an alleged infringement of Article 14(2) of Regulation No 659/1999, is not admissible, the third plea based on alleged infringement of Article 9(4) of Regulation No 794/2004 with regard to the fixing of an appropriate

rate is devoid of purpose, as the Commission has rightly argued. It is impossible to discern in the appellants' arguments a complaint raised against the General Court which is based exclusively on an alleged infringement of Article 9(4) of Regulation No 794/2004 and not on the concept of an 'appropriate rate' within the meaning of Article 14(2) of Regulation No 659/1999.

143 Consequently, the third plea must be dismissed as unfounded.

144 Since none of the pleas in the appeal has been successful, the appeal must be dismissed in its entirety.

Costs

145 The first paragraph of Article 122 of the Rules of Procedure of the Court of Justice states that where the appeal is unfounded the Court shall make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs against the appellants and the latter have been unsuccessful in their pleas, they must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the appeal.**

2. **Orders ISD Polska sp. z o.o. and Industrial Union of Donbass Corp. to pay the costs.**

[Signatures]